No. 02-956 (A)

Supreme Court, U.S.
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In The
# Supreme Court of the United States

A. T. MASSEY COAL COMPANY, INC., *et al.*,
*Petitioners,*

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## PETITIONERS' REPLY TO BRIEFS IN OPPOSITION FILED BY FEDERAL RESPONDENT AND RESPONDENTS TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

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Caption of the cover contains all names.

## CORPORATE DISCLOSURE STATEMENT

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Respondents' position is that this Court would have decided *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), differently had Congress set the statutory date for establishing related person liability at July 20, 1987 (rather than July 20, 1992). *See* 26 U.S.C. § 9701(c)(2)(B). According to Respondents (and the court below) this is because application of a statutory definition that would brand Eastern a "related person" to 1974 signatory EACC would somehow have mitigated the extreme retroactive effect of the Act that was the basis for this Court's decision that the Coal Act was unconstitutional as applied to Eastern. If the Members of this Court agree with Respondents' view that the constitutional issues identified in the plurality and Justice Kennedy's opinions would not have existed had Congress set the statutory date for determining related person liability at July 20, 1987, then this Petition should be summarily rejected.

The happenstance of the statutory date for ascribing significance to common ownership is the only reason the Commissioner offered for her conclusion that Petitioners' situation is not substantially identical to Eastern's. This is a difference solely arising from a statutory distinction, however. It has no bearing on the constitutional analysis that underlies the opinions in *Eastern*. On the material facts (*i.e.*, the signatory histories of Eastern and Petitioners and their respective affiliates) this case is on all fours with *Eastern*. Petitioners respectfully submit this reply to address certain new points offered by the Commissioner and Trustees in their oppositions to the Petition for Writ of Certiorari.

1. Respondents do not dispute (because they cannot) that Eastern was in a control group with EACC when that company signed the 1974, 1978, 1981 and 1984 coal wage agreements promising lifetime health benefits to UMWA retirees. That relationship did not affect the analysis or outcome in the opinions authored by Justice O'Connor and

Justice Kennedy. Although Petitioners are in the same position, Respondents insist they are different from Eastern. *See, e.g.*, Trustees' Opp. at 2 ("[Petitioners] either own or are under common control with more than a dozen 'related persons' that signed NBCWAs in 1974, 1978, 1981, or 1984. [Petitioners] thus are readily distinguishable from Eastern").

In determining whether *Eastern* should be applied to Petitioners, the Commissioner's task was to identify the material facts in that case and apply the result to all companies presenting the same or substantially identical material facts. The Commissioner did not carry out this responsibility as required. Instead, the Commissioner looked beyond the material facts in an effort to find some other basis for distinguishing Petitioners from Eastern. The Commissioner's refusal to extend the Court's decision in *Eastern* to Petitioners was not based on a material factual difference, rather it rested solely on a statutory difference -- the applicability of the related person definition to Petitioners but not to Eastern. By relying on this statutory difference, and ignoring the fact that in every substantive way Petitioners present a case identical to Eastern's, the Commissioner wrongly narrowed the reach of *Eastern*.[1]

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[1] No one's health care benefits will be adversely affected if the holding in *Eastern* is extended to Petitioners. As with Eastern's beneficiaries (and the beneficiaries of other companies whose assignments were withdrawn in response to *Eastern*), beneficiaries assigned to Petitioners would be recharacterized as unassigned beneficiaries, and the cost of their benefits will be provided for by the annual transfer payments made from the Abandoned Mine Land Reclamation Fund ("AML Fund") to the Combined Fund. 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h). To date, annual transfer payments from the AML Fund and from other sources authorized by the Coal Act have covered the health benefits of all unassigned miners. Should the annual AML Fund transfers ever prove insufficient to cover these costs, the Coal Act provides that assigned operators will make up the difference on a pro rata basis. 26 U.S.C. § 9704(d). This structure ensures that no Combined Fund beneficiary will ever lose coverage.

2. Apparently recognizing that the related person definition alone may not provide a basis for surmounting the constitutional defect in *Eastern*, the Commissioner and Trustees seek to ascribe to related person status a larger statutory purpose than merely expanding the universe of entities that may be held liable as guarantors for a signatory employer's constitutionally valid premium obligations. In this regard they seek to marry the related person definition at section 9701(c)(2) with the employment aggregation rule at section 9706(b)(1) of the Act, 26 U.S.C. § 9706(b)(1), to impute the signatory status of one member of a controlled group to all members of the group. Comm. Opp. at 14 n.6; Trustees' Opp. at 7-8, 25.

Building on this, Respondents argue that Congress provided yet another statutory basis for distinguishing Petitioners from Eastern, because under section 9706(b)(1) employment by Petitioners is constructive employment by any member of Petitioners' controlled group that signed a 1974 or later coal wage agreement. In developing this argument Respondents conveniently quote only part of the Coal Act's aggregation rule. Comm. Op. at 5, 14 n.4; Trustees' Opp. at 8. In its entirety the provision reads:

> **(b) Rules relating to employment and reassignment upon purchase.**—For purposes of subsection (a)—
>
> **(1) Aggregation rules.**—
>
> (A) **Related person.**
>
> Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

26 U.S.C. § 9706(b)(1)(A).

When read in context, the purpose of the rule is clear; for purposes of making assignment determinations under subsection (a) (which allocates assignments to operators based, in part, on length of employment as among several different employers), the Commissioner is to aggregate periods of employment where the miner worked both for a signatory operator and a related person to that signatory operator. Indeed, there is no other purpose for the rule, because the statute separately specifies that a related person is liable for an assigned operator's Coal Act obligations.

This rule does not direct the Commissioner to treat all related persons as if they were a single entity with regard to their signatory status, nor does it authorize the Commissioner to impute to Petitioners the signatory status of other controlled group members that may have been signatory to a 1974 or later agreement. "Aggregation" means to add together and that is how the Commissioner applied this provision in making assignments. Where a miner has worked for more than one related person the Commissioner aggregates the employment for purposes of determining which employer among many is to receive the assignment.

The Commissioner fails to mention that she assigned the beneficiaries challenged in this case to Petitioners under section 9706(a)(3) (the lowest assignment priority which applies only to operators that did not sign a 1978 agreement). Although Petitioners are related persons to 1978 signatories, the Commissioner did not make assignments to Petitioners by attributing 1978 signatory status to them. In defense of her refusal to apply *Eastern* to Petitioners the Commissioner has embarked on a line of argument that the statute does not support and that she has not previously followed. Indeed, if it is now her position that the signatory status of one control group member is imputed to all companies in the group, she would have to

reconsider and possibly reissue thousands of previous beneficiary assignments because many assignments made under section 9706(a)(3) – the category of last resort – should instead have been considered for assignment under a higher statutory priority.

3. Under the statute, assignments are not made to a "control group." Rather, based on a review of each miner's individual work history and on the signatory status of the miner's various employers, the Commissioner is required to assign the miner to the signatory operator still in business who met the highest level of assignment criteria. 26 U.S.C. § 9706. Other than the aggregation rule, which applies where a miner worked for more than one related person, the fact that a miner's employer had one or more related persons did not figure into application of the assignment criteria unless the employer was out of business, in which case section 9706 authorized the Commissioner to make the assignment to a related person of the defunct employer. This is how all assignments were made, and it is disingenuous for the Commissioner (and error on the part of the court below) to contend that assignments are somehow made to an entire control group, or that signatory status of one company may be attributed across all members of the group.[2]

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[2] In her opposition brief, the Commissioner is careful to say that she "sustained" Petitioners' assignments on the basis of their control group membership. Comm. Opp. at 14 n.4. She pointedly does not say that assignments to Petitioners were made on a control group basis, or because Petitioners were a "related person" to a company that had separately signed a 1974 or later coal wage agreement, because they were not.

The Commissioner also incorrectly contends that the court of appeals did not address whether "the Commissioner lacked authority to maintain their assignments based on whether the controlled group, as a whole, employed the miners at issue and signed 1974 or later NBCWAs." Comm. Opp. at 14 n.4. That is precisely what the Fourth Circuit concluded. App. A-11-12, A-23-26.

4. The Commissioner acknowledges that "the plurality and concurring opinions emphasized that Eastern had not signed the 1974 NBCWA, which was the first to make an explicit promise of lifetime health-care benefits, or any subsequent NBCWA, and thus could not reasonably have contemplated being held responsible for providing such benefits." Comm. Opp. at 12. This notwithstanding, the Commissioner claims in this case that "petitioners could reasonably have anticipated that they would be required to provide lifetime healthcare benefits for their retirees. That is because petitioners are (and at all relevant times have been) members of a commonly controlled group of corporations, other members of which signed the 1974 and subsequent NBCWAs promising lifetime benefits not only to their own retirees, but also to other retirees who were 'orphaned' by their employers." Comm. Opp. at 12. This is a non-sequitur. Eastern also was in a control group with EACC, a 1974 signatory, from 1974 to1987 and EACC made precisely the same "promises" as Petitioners' related 1974 signatory affiliates. Moreover, Eastern's management closely directed the labor relations of EACC and Eastern received substantial dividend revenues from its wholly-owned subsidiary. *Eastern*, 524 U.S. at 516 (plurality), 565-66 (Breyer, J., dissenting). Plainly, there is no reason that Petitioners should have been more prescient than Eastern in anticipating that Congress might require them to provide lifetime healthcare to their former employees.

5. The Commissioner claims that "[i]t is reasonable to presume that the entire controlled group profited from the services rendered by its employees in return for its promises of lifetime benefits." Comm. Opp. at 14-15. Insofar as that argument has any merit at all, it applies equally to Eastern whose wholly-owned 1974 signatory subsidiary paid more than $100 million in dividends to Eastern from 1966-1987. *Eastern*, 524 U.S. at 516 (plurality), 565-66 (Breyer, J., dissenting). Therefore, profiting from the services a retiree

may have rendered to an affiliate provides no basis for the Commissioner's claim that Petitioners are not in substantially the same position as Eastern.

6. If Eastern had never been affiliated with a 1974 signatory (or had disposed of its interest in a signatory company prior to 1974), then the Commissioner's claim that Petitioners are not substantially identical to Eastern would have merit. Of course, this is not the case because it is clear Eastern was a related person to a 1974 signatory from 1974 through 1987 as a factual matter although not statutorily. The only reason the Commissioner offered for her conclusion that Petitioners are not similarly situated to Eastern is the timing of Petitioners' relationship to 1974 signatories (*i.e.*, that they were related on July 20, 1992). The Commissioner did not base her administrative decision on the presence or absence of any other connections between Petitioners and their 1974 signatory affiliates.

In their opposition brief the Trustees engage in a lengthy diatribe about the Petitioners' involvement in the coal industry, presumably for the purpose of convincing the Court that Petitioners are not deserving of the result afforded by *Eastern*. *See* Trustees' Opp. at 9-13. The problem with this entire argument is that the Commissioner did not rely on any of this in making the administrative decision under review. Indeed, we know that none of this was relied on or relevant to the Commissioner's decision, because she would have refused to withdraw Petitioners' assignments even if their only connection to a 1974 signatory was a brief control group relationship with a 1974 signatory only during the month of July, 1992.

The Commissioner's theory is that attaining "related person" status under section 9701(c)(2) of the Coal Act provides a "material fact" sufficient to differentiate a pre-1974 signatory from Eastern. Achieving this related person status does not turn on how long companies have been

related, the only determinant is whether they were related on July 20, 1992 (or immediately prior to the time the signatory employer ceased to be in business). The only aspect of Petitioners' corporate history relevant to the Commissioner's refusal to extend the holding in *Eastern* to them is the fact that on July 20, 1992 their corporate controlled group included a company that had signed a 1974 coal wage agreement. The Trustees' "supporting facts" concerning Petitioners' history are just makeweight, proffered to deflect attention from the fact the Commissioner's position is simply unsustainable as a matter of constitutional law.

7. The Respondents' real argument seems to be that if Congress had chosen in the Coal Act to assign liability only to 1974 or later signatories, and make all 1974 signatories liable for miners who had worked for related companies, then such a system would have been constitutional. The problem with their effort to characterize the issue in this manner is (a) that is not what Congress did, (b) that is not the way the Commissioner made assignments, and (c) while that particular statutory structure might have presented issues requiring clarification by this Court, that is not the liability assignment scheme before the Court in this case.

The issue presented in this case does not concern what Congress did not do. It concerns solely the facts presented in Eastern's case and whether the Commissioner wrongly refused to apply the holding in *Eastern* to Petitioners.

8. The Commissioner and Trustees assert that this case is not of continuing importance. This is difficult to reconcile with the fact that the same issue is presented in two other pending petitions for certiorari. *Berwind Corp. v. Commissioner of Soc. Sec.*, 301 F.3d 222 (3d Cir.), *petition for cert. filed,* No. 02-995 (U.S. Dec. 24, 2002); *Shenango Inc. v.*

*Apfel*, 307 F.3d 174 (3d Cir. 2002), *petition for cert. filed*, No. 02-1419 (U.S. March 21, 2003). Furthermore, Petitioners are aware that the same issue is also presented in several other cases pending in the lower courts. *Wheeling-Pittsburgh Steel Corp. v. Commissioner of Soc. Sec.*, No. 5:99CV60 (N.D. W.Va. May 22, 2002), Nos. 02-1799, 02-1800 (4th Cir. filed July 29, 2002); *Nell Jean Indus., Inc. v. Barnhart*, 224 F. Supp. 2d 10 (D.D.C. 2002) (time for filing notice of appeal has not yet run); *Holland v. Turner Elkhorn Mining Co.*, No. 1:02CV02248 (D.D.C. filed Nov. 14, 2002).

## CONCLUSION

For all of the forgoing reasons and all the reasons presented in the Petition for Writ of Certiorari, Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

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